Supreme Court, U.S.
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No. 03-633

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**In the**
**SUPREME COURT OF THE UNITED STATES**

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**DONALD P. ROPER,**
**Superintendent, Potosi Correctional Center,**
**Petitioner,**

**v.**

**CHRISTOPHER SIMMONS,**
**Respondent.**

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**Petition for Writ of Certiorari**
**to the Supreme Court of Missouri**

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# REPLY TO BRIEF IN OPPOSITION

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## QUESTION PRESENTED FOR REVIEW
(Capital Case)

The Supreme Court of Missouri departed from this Court's holding in *Stanford v. Kentucky*, 492 U.S. 361 (1989), in which the Court upheld statutes under which the minimum age for capital punishment is sixteen. The Missouri court's decision raises two questions:

1. Once this Court holds that a particular punishment is not "cruel and unusual" and thus barred by the Eighth and Fourteenth Amendments, can a lower court reach a contrary decision based on its own analysis of evolving standards?

2. Is the imposition of the death penalty on a person who commits a murder at age seventeen "cruel and unusual," and thus barred by the Eighth and Fourteenth Amendments?

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## ARGUMENT

Respondent Simmons attempts to minimize the significance of the Missouri Supreme Court's decision with regard to both questions posed in the petition. His attempt fails. He is unable to dispute that the Missouri Supreme Court claims for lower courts the right to reinterpret what is "cruel and unusual." He is unable to dispute that the holding in *Stanford v. Kentucky*, 492 U.S. 361 (1989), is no longer good law in Missouri – though it remains the rule in other states, despite repeated petitions to have this Court reconsider it. And his statistical evidence demonstrates that this petition presents a question with current and future implications beyond the scope of his case, and beyond the borders of the State of Missouri.

1. Respondent first attempts to minimize the significance of the Missouri Supreme Court's assumption of authority to unilaterally "update" this Court's Eighth Amendment jurisprudence. In his view, the Missouri court merely "appli[ed] the federal legal rule on the issue of what constitutes cruel and unusual punishment." Brief in Opposition at 4. To make that claim, he must recharacterize the "legal rule" in *Stanford*.

In *Stanford*, this Court held that the Missouri statute that set 16 as the minimum age for capital punishment did not impose a "cruel and unusual" punishment. Respondent would have the Court now ignore that holding, and instead create a rule out of the rationale used to reach it. Then Respondent would permit all lower courts to apply that rationale to reach holdings contrary to those of this Court. But there is no authority in *Stanford* – nor in *Atkins v. Virginia*, 536 U.S. 304 (2002), on which the Missouri court relied – that delegates such power to lower courts.

Searching for precedents that would support his claim that this Court allows lower courts to revisit its Eighth Amend-

ment holdings, Respondent cites two instances in which state courts tackled issues that arose under this Court's precedents. But neither is analogous to what the Missouri Supreme Court did here.

In *State ex rel. Holmes v. Honorable Court of Appeals for the Third District*, 885 S.W.2d 389 (Tex. Crim. App. 1994), the state appellate court applied this court's decision in *Herrera v. Collins*, 506 U.S. 390 (1993). According to the Texas court, in *Herrera* "six members of the Supreme Court . . . recognized the execution of an innocent person would violate the Fourteenth Amendment." 885 S.W.2d at 397. The court held that given that conclusion, the defendant could use a state habeas petition as a means of addressing actual innocence. But unlike the Missouri court here, the Texas court did not purport to bypass, revise, or update *Herrera*. It is hardly surprising that in *Holmes* there was no petition for a writ of certiorari from this Court.

In *State v. Colton*, 663 A.2d 339 (Conn. 1995), cert. denied, 516 U.S. 1140 (1996), the Connecticut Supreme Court construed *Oregon v. Kennedy*, 456 U.S. 667 (1982). But like the Texas court in *Holmes*, the Connecticut court did not depart from this Court's holding. As Respondent here correctly states (Brief in Opposition at 6), the Connecticut court had before it a situation that this Court had not addressed in *Kennedy*, *i.e.*, prosecutorial misconduct that was analogous to that in *Kennedy*, but that was "clandestine," not "visible." 663 A.2d at 347. And the Connecticut court considered that situation in response to a claim that the defendant had been improperly denied "the opportunity to create a record" that "'the misconduct of the prosecutor [was] undertaken not simply to prevent an acquittal but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct.'" *Id.* at 347-48, quoting *United States v. Wallach*, 979 F.2d 912, 916 (2d Cir. 1992), cert. denied, 508 U.S. 939 (1993). Prosecutorial



intent was at the core of the *Kennedy* test; it was not some new test developed in *Colton* as a departure from *Kennedy*.

Neither *Holmes* nor *Colton* was, of course, an Eighth Amendment case. Respondent remains unable to cite any precedent for delegating to lower courts the power to reconsider what the Eighth Amendment bars as "cruel and unusual," and unable to explain how our system could fairly deal with the differences that such delegation would inevitably produce. Indeed, Respondent entirely omits discussion of the results of differing rules across the nation, or of permitting rules to change – either to bar or to permit particular punishments – at the choice of individual courts in each and every state, territory, and federal circuit.

2. Respondent next attempts to minimize the impact of the Missouri court's particular holding, arguing that the Court should decline review because he is the only person affected. Literally, of course, Respondent is right; the "decision in Mr. Simmons' case affects *only* Missouri (and in fact . . . *only* Chris Simmons)." Brief in Opposition at 12. But that claim ignores the precedential value of the decision of a state's highest court. And it ignores the fact that the decision is precedent not just as to the question of capital punishment for those who act just before turning 18, but as to which courts will determine what constitutes "cruel and unusual" punishment.

To claim this case is unique, Respondent also argues that no Missouri prosecutor is currently seeking capital punishment against a person who was under age 18 at the time the person murdered; thus, he concludes, the decision of the court below is unimportant. Brief in Opposition at 10. That conclusion makes sense only to one who is blind to the future. It ignores the possibility – indeed probability – of future, perhaps even more egregious, crimes committed by those not yet 18. It ignores the deterrent effect of the death penalty –

indeed, it would give substance to Respondent's claim, made as he recruited accomplices, that he could "get away with it." And it ignores the need to give potential criminals, prosecutors, and legislators clear and consistent constitutional rules.

3. Lastly, Respondent contends that capital punishment of those who were under eighteen at the time they murdered is statistically unimportant. Brief in Opposition at 10-11. But Respondent's own chart shows that between 1993 and 2003, 102 offenders who had murdered at ages sixteen and seventeen were sentenced to receive capital punishment. Brief in Opposition at 11. Respondent points out the historically high use of juvenile capital punishment since 1993. Respondent contends that "eighteen juveniles have been executed out of the approximately 674 executions carried out" between 1993 and 2003, approximately 2.7%, a high rate compared to the historically 2% attributed to juvenile executions since 1608. Brief in Opposition at 10-12, citing Streib, Victor L., *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973 - December 15, 2003*, at 4 (viewed Jan. 5, 2004, at http://www.law.onu.edu/faculty/streib/juvdeath.htm). And he asserts that 28 "juveniles sit on death row" in Texas alone. Brief in Opposition at 12 n. 8.

Those statistics do not minimize the important of the second question posed in the petition. They prove, at the very minimum, that there are many who are subject to capital punishment in states other than Missouri, whose sentences would be deemed unconstitutional if reviewed in Missouri courts – an inequity that Respondent can neither minimize nor justify.



## CONCLUSION

For reasons stated above and in its petition for writ of certiorari, petitioner prays the court grant the petition.

Respectfully submitted,

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